



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 104 OF 2013

SIMBA CORPORATION LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT/RESPONDENT

PAMELA JOY OUKO T/A SADIQUE

ENTERPRISES AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

The application is dated 9th December 2019 and is brought under section 1A, IB & Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That this application be certified as urgent and heard ex parte in the first instance and service thereof be dispensed with.
2. That this Honourable Court be pleased to extend the orders granted herein on 7th November 2019 by Hon. Justice Yano restraining any adverse action by the Defendants against the Plaintiffs in respect of parcel of land known as Title No. Mombasa/Block XLVIII/114 pending the hearing and determination of this application.
3. That pending the hearing and determination of this application, the Defendants by themselves, through their employees, servants, officers and/or agents, jointly and severally be and are hereby restrained from levying distress on the disputed annual rent and/or in any other manner whatsoever and howsoever from interfering with the Plaintiff's peaceful and quiet occupation and enjoyment of all that parcel of land known as Title No. Mombasa/Block XLVIII/114.
4. That pending hearing and determination of the Appeal, the Defendants by themselves, through their employees, servants, officers and/or agents, jointly and severally be and are hereby restrained from levying distress on the disputed annual rent and/or in any other manner whatsoever and howsoever from interfering with the Plaintiff's peaceful and quiet occupation and enjoyment of all that parcel of land known as Title No. Mombasa/Block XLVIII/114.
5. That the costs of this Application be in the cause.
6. That this Honourable Court does issue any other orders and/or directions it deems just and appropriate.

The application is based on the grounds that at all material times, the Plaintiff and the 1st Defendant herein have had a lessor-lessee relationship. The Plaintiff filed a suit against the Defendants vide a plaint dated 22nd May 2013 seeking inter alia, a declaration that the 1st Defendant has no right under the terms of lease dated 24th April 1967 to raise the annual rent payable for the parcel of land known as Mombasa Block/XLVIII/114 until 1st January 2026. Through a judgment dated 7th November 2019, made by Hon. Justice Komingoi and read by Hon. Justice Yano, the Plaintiff's case herein was dismissed primarily on account that no notice had been issued under Section 87 of the Kenya Railways Corporation Act prior to filing of this suit. Following delivery of the said judgement, Justice Yano granted the Plaintiff an order of stay to restrain any adverse action against it by the Defendants for a period of 30 days, which orders will lapse unless this Honourable Court extends them as prayed herein. That the Plaintiff, being aggrieved and dissatisfied with the said judgment, lodged a Notice of Appeal on 21st November 2019. That the said Appeal is likely to succeed as it raises serious issues regarding violation of the Constitution Strangely, despite the Defendants' knowledge of the aforesaid stay of execution orders, they still went ahead to issue a Demand Notice on 14th November 2019 threatening adverse action and in particular to evict the Plaintiff from the suit property. That unless the orders sought herein are granted, the Plaintiff is poised to suffer massive loss as the Defendants are likely to make good their threat to evict the Plaintiff from the subject property much to the Plaintiff's detriment. Invariably, unless the orders sought herein are granted the intended appeal and this application will be rendered nugatory. That the Plaintiff is likely to suffer substantial loss resulting from disenfranchisement of the

significant investment it has made on the suit property. That no prejudice will be suffered by the Defendants as a result of grant of the orders sought herein given that the same orders being sought are the same ones that have been obtaining during the currency of this suit by consent of the parties made on 2nd October 2013.

The Respondent stated that the Applicant is a tenant of the 1st Respondent on the Parcel of land known as Mombasa/Block XLVIII/14. That the dispute before the court was whether the Landlord had lawfully exercised its right to increase rent from 27,000 to Kshs.2,815,720 annually. That in the judgment delivered on 24th October 2019, the Court found that it was lawful for the defendant to increase rent and that the increment was legitimate. That it was on this account that the Plaintiff's suit was dismissed. That the Plaintiff Applicant is in arrears of Kshs. 16,991,000 as at 1st October 2020. Annexed and marked as A-1 is a copy of the account statement. That the right to re-enter or evict upon default in paying rent is a contractual right given to the Landlord under the Lease and should not be interfered with by the court.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (1) unless:-

a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment

delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

From the grounds herein, the Plaintiff had filed a suit against the Defendants vide a plaint dated 22nd May 2013 seeking inter alia, a declaration that the 1st Defendant has no right under the terms of lease dated 24th April 1967 to raise the annual rent payable for the parcel of land known as Mombasa Block/XLVIII/114 until 1st January 2026. Through a judgment dated 7th November 2019, made by Hon. Justice Komingoi and read by Hon. Justice Yano, the Plaintiff’s case herein was dismissed the suit. That the Plaintiff, being aggrieved and dissatisfied with the said judgment, lodged a Notice of Appeal on 21st November 2019. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. It has come out in submissions that part of the judgement has already been executed and it is only the monetary part left. I have perused the court record and the grounds of appeal. This court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application dated 9th December 2019 has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23rd DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE